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No. 07-543

IN THE

# Supreme Court of the United States

AT&T CORPORATION,

*Petitioner,*

v.

NOREEN HULTEEN; ELEANORA COLLET; LINDA PORTER; ELIZABETH SNYDER; COMMUNICATIONS WORKERS OF AMERICA,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR THE PETITIONER

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## QUESTIONS PRESENTED

Before the passage of the Pregnancy Discrimination Act of 1978 (PDA), it was lawful to award less service credit for pregnancy leaves than for other temporary disability leaves. *General Elec. Co.* v. *Gilbert*, 429 U.S. 125 (1976). Accordingly, the questions presented are

1. Whether an employer engages in a current violation of Title VII when, in making post-PDA eligibility determinations for pension and other benefits, the employer fails to restore service credit that female employees lost when they took pregnancy leaves under lawful pre-PDA leave policies.

2. Whether the Ninth Circuit's finding of a current violation of Title VII in such circumstances gives impermissible retroactive effect to the PDA.

## PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

AT&T Corporation ("AT&T") is a wholly owned subsidiary of AT&T Inc., a publicly traded company. No entity owns more than 10% of AT&T Inc. stock.

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## OPINIONS BELOW

The order of the United States District Court for the Northern District of California granting summary judgment against petitioner AT&T Corporation ("AT&T"), is unreported, and is reproduced in the Appendix to the Petition for Certiorari ("Pet. App.") 98a-128a. The initial decision of the Ninth Circuit is reported at 441 F.3d 653 (9th Cir. 2006), and reproduced at Pet. App. 64a-97a. The Ninth Circuit granted rehearing en banc in an order reported at 455 F.3d 973 (9th Cir. 2006), and reproduced at Pet. App. 129a. The en banc decision of the Ninth Circuit—which is the judgment under review here—is published at 498 F.3d 1001 (9th Cir. 2007), and reproduced at Pet. App. 1a-63a.

## JURISDICTION

The court of appeals, sitting en banc, entered judgment on August 17, 2007, Pet. App. 1a. AT&T filed a petition for certiorari on October 22, 2007, and this Court granted the petition on June 23, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k)), and other relevant statutes are reproduced in the statutory addendum to this brief.

## STATEMENT OF THE CASE

In the decision below, an en banc panel of the Ninth Circuit held that AT&T violated Title VII when, in calculating the pension benefits of retiring female

employees between 1994 and 2000, AT&T relied on service credit, or seniority, decisions that it had made decades earlier—and that were entirely lawful when made. Prior to the Pregnancy Discrimination Act of 1978 ("PDA"), AT&T treated pregnancy leave as personal leave, and therefore awarded less than full service credit, or seniority, for time spent on such leaves. At the time, this conduct was lawful. See *General Elec. Co.* v. *Gilbert*, 429 U.S. 125 (1976). When the PDA took effect, AT&T changed its leave policies to award the same service credit for pregnancy leaves that it awarded for temporary disability leaves. But, because the PDA did not apply retroactively, AT&T did not re-calculate the service credit of women who had taken pre-PDA pregnancy leaves. When these women retired decades later, AT&T calculated their pension benefits in accordance with the seniority they had earned over the course of their careers, including the less than full service credit earned under AT&T's then-lawful pre-PDA leave policies.

The Ninth Circuit's conclusion that AT&T engaged in current violations of Title VII by relying on decades-old service credit awards is plainly wrong, and conflicts with the well-settled precedent of this Court. First, by holding AT&T liable because it relied on pre-PDA lawful denials of service credits, the decision below necessarily gave the PDA impermissible retroactive effect. Second, even if AT&T's earlier service credit awards are now deemed to have been unlawful, the limitations period for challenging these decades-old decisions expired long ago, and this Court has repeatedly held that Title VII is not violated anew whenever an employer gives present effect to no-longer actionable acts of discrimination. Third, § 703(h) of Title VII codifies this very principle where, as here, past acts of discrimination are given present

effect through an otherwise lawful seniority system. None of the reasons cited by respondents or the en banc majority below justifies the Ninth Circuit's refusal to follow these dispositive principles.

### A. Statutory Background

Since 1964, Title VII has forbidden discrimination on the basis of sex. 42 U.S.C. § 2000e-2(a)(1). In 1976, however, this Court held that the exclusion of pregnancy from a general disabilities plan did *not* constitute sex discrimination under Title VII. *Gilbert*, 429 U.S. at 125. Congress responded to *Gilbert* by enacting the PDA, which amended Title VII's definition of "because of sex" and "on the basis of sex" to include discrimination based on pregnancy-related conditions. See 42 U.S.C. § 2000e(k).

Although the law took effect on the date of its enactment (October 31, 1978), Congress expressly provided employers an additional 180 days (until April 29, 1979) to modify pre-existing benefits policies to treat pregnancy leaves the same as other forms of temporary disability. See PDA, § 2(b), 92 Stat. at 2076 (PDA does not apply to "any fringe benefit program or fund . . . which is in effect on the date of enactment of this Act until 180 days after enactment of this Act."); see also *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 671 n.2 (1983).

Additionally, Title VII contains two provisions relevant to seniority systems. First, § 703(h), codified at 42 U.S.C. § 2000e-2(h), provides that a discriminatory effect stemming from a "bona fide" seniority system is not an unlawful employment practice. This exception does not apply to facially discriminatory seniority systems, or to facially neutral systems that were adopted for an intentionally discriminatory purpose. Second, § 706(e)(2), which was enacted in 1991, pro-

vides that, in the case of seniority systems that are either facially discriminatory or facially neutral but adopted for an intentionally discriminatory purpose, an employee may sue when the seniority system is adopted, when the employee becomes subject to the system, or when he or she is injured by the application of that system. Pub. L. No. 102-166, sec. 112(2), § 706(e)(2), 105 Stat. 1071, 1079 (codified as amended at 42 U.S.C. § 2000e-5(e)(2)) (hereinafter, § 706(e)(2)).

### B. Factual Background

AT&T's nearly century-old seniority system, known as the Net Credited Service ("NCS") system, has long been used by members of the former Bell System—both before and after its break-up in 1984—to quantify each employee's seniority, or term of employment. JA 38-40 (¶¶ 17, 21). Under the NCS system, an employee's first day on the job becomes her NCS date. The earlier the date, the better positioned the employee is for service-related determinations, such as competitive job bidding, shift preference, lay-off determinations, vacation time, and retirement benefits. *Id.* at 39. (¶¶ 18-19).

To reflect an employee's period of service accurately, however, it is sometimes necessary to adjust an initial NCS date. For example, two employees who both started work on July 1, 1975, should not be treated the same for seniority purposes if one of them took a personal leave of absence for six months in 1977 and the other never took any leave. To address this type of situation, the NCS date is moved forward to reflect any periods of leave or other absences for which less than full service credit is given. JA 38-40 (¶¶ 17, 18, 21). In the above hypothetical, the first employee's NCS date would remain July 1, 1975. The second employee's NCS date would be advanced in

time to reflect the period of time spent on uncredited personal leave.

After divestiture, AT&T continued to use the NCS system for its own pre-divestiture employees and for employees of the former Bell System (such as Pacific Telephone and Telegraph ("PT&T")) who transferred to AT&T after divestiture.[1] During the intervening two decades, countless daily personnel decisions were made in reliance on the NCS system, for both management and hourly employees.[2]

Before the PDA's effective date in 1979, AT&T classified pregnancy leaves as personal leaves, not as disability leaves. This distinction was significant because NCS adjustments were handled differently for these categories of leave. For personal leaves, employees were paid, and received service credit, for only the first 30 days of leave. For disability leaves, employees received service credit for the entire period of their paid disability leave. JA 47-52 (¶¶ 66, 68, 71-78, 81-83, 85-86). Thus, an employee who took three months of personal leave would have her NCS date moved forward 60 days (90 – 30), while an employee who took three months of disability leave would have an unchanged NCS date.[3]

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[1] Respondents were originally employed by PT&T and transferred to AT&T after divestiture.

[2] For hourly employees, this is a matter of contract: collective bargaining agreements between AT&T and respondent Communications Workers of America ("CWA") have consistently provided that benefits and the competitive allocation of job rights are based on NCS dates. JA 39-40 (¶¶ 19-20).

[3] Between August 7, 1977 and the date the PDA took effect, AT&T increased the service credit for pregnancy leave to 30 days before delivery and six weeks after delivery. JA 48 (¶ 70). After six weeks, the leave became personal leave. *Id*.

On April 29, 1979 (the effective date of the PDA), AT&T began providing service credit for pregnancy leaves on the same basis as leave taken for temporary disabilities. JA 50 (¶ 79). AT&T did not, however, retroactively adjust the service credit awards of women who had previously taken maternity leaves. *Id*.

Each of the respondent employees took pregnancy leaves between 1968 and 1976. JA 40-46 (¶¶25-62). Each received less than full service credit for these leaves because, under AT&T's policies, these leaves were treated as personal leaves. *Id*. Accordingly, AT&T adjusted the NCS date of each upon her return from pregnancy leave. *Id*. Each employee "maintained" her adjusted NCS date following her transfer from PT&T and "was aware that her NCS date traveled with her from PT&T to AT&T." *Id*. at 41, 43, 44, 45 (¶¶ 29, 40, 51, 60). Moreover, "[t]hroughout her employment with PT&T and AT&T, [each] periodically received documents that contained her [adjusted] NCS date." *Id*. at 43, 44-46 (¶¶ 39-42, 50-53, 59-61).

Three of the four individual respondents retired from AT&T between 1994 and 2000.[4] In determining their pension benefits, AT&T "use[d] the NCS date previously computed for leave taken before" the PDA's effective date. JA 75.[5] As a result, the term of

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[4] Respondent Linda Porter is a current AT&T employee.

[5] AT&T is permitted to adjust an employee's NCS date when "the date has been calculated incorrectly" or "the change is necessary to comply with legal requirements." JA 56 (¶ 104). Accordingly, AT&T adjusted the NCS date of respondent Elizabeth Snyder because she was not given the 30- days service credit she had been entitled to under the policy at the time of her pregnancy leave. *Id.* at 46 (¶ 63).

employment used to calculate the pension benefits for these three respondents was not as long as it would have been had they received full service credit for their pre-PDA leaves. For example, when respondent Hulteen retired in 1994, she had "210 days of uncredited pregnancy leave that resulted in reduced pension benefits." Pet. App. 5a.

### C. The District Court's Decision

Claiming that their benefits were calculated unlawfully, the respondent employees, joined by the CWA, filed suit in the United States District Court of the Northern District of California. Based on stipulated facts, the parties filed cross-motions for summary judgment. Respondents chiefly relied on a prior Ninth Circuit decision, *Pallas* v. *Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), which held that an identical NCS system calculation violated the PDA. *Pallas* had reasoned that Pacific Bell's reliance in 1987 on Pallas's previously-adjusted NCS date to determine eligibility for retirement benefits perpetuated earlier discrimination and thereby rendered the NCS system "facially discriminatory."

AT&T argued that *Pallas* was no longer controlling law because intervening decisions of this Court, including *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), demonstrated that *Pallas* had given the PDA an impermissible retroactive effect. Although noting that AT&T's arguments had "great logical and legal force," Pet. App. 121a, the district court concluded it was bound by *Pallas*. It therefore granted respondents' motion for summary judgment, *id.* at 123a, 128a, but certified the issue of liability under the PDA for interlocutory appeal. JA 21.

### D. The Initial Panel Opinion

On appeal, the court of appeals agreed with AT&T, holding that *Pallas* was no longer controlling law in light of, *inter alia*, *Landgraf*. The panel reasoned that:

> [t]he failure to award employees full service credit for their pregnancy leaves could be labeled facially discriminatory only if employees [who took pre-PDA pregnancy leaves and employees who took paid disability leaves before the PDA] were similarly situated, e.g., if all were legally entitled to receive full credit for their leaves before the enactment of the PDA. But that would be true only if the PDA were given impermissible retroactive effect.

Pet. App. 80a. Judge Rymer dissented solely because she did not believe that *Pallas* was "clearly irreconcilable" with intervening authority. *Id.* at 88a.

### E. The En Banc Decision

A divided en banc panel reaffirmed *Pallas*'s holding that post-enactment reliance on pre-PDA service credit calculations violates Title VII.

In so ruling, the majority rejected AT&T's argument that *Pallas* was wrongly decided as an initial matter in light of *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), which held that a new Title VII violation does not occur when a "seniority system gives present effect to [a time-barred] past illegal act and therefore perpetuates the consequences of forbidden discrimination." *Id.* at 557. The majority below, however, accepted *Pallas*'s conclusion that the NCS system is "facially discriminatory," and thus distinguished *Evans*—as well as this Court's then-recent decision in *Ledbetter* v. *Goodyear Tire & Rubber Co.*,

127 S. Ct. 2162 (2007)—on the ground that both of these cases involved facially neutral seniority systems. Pet. App. 9a-10a. The majority concluded that this case was controlled instead by *Bazemore* v. *Friday*, 478 U.S. 385 (1986) (per curiam), where this Court held that an employer's decision to continue paying black workers less than similarly situated white workers after the employer became subject to Title VII constituted a new violation of Title VII. *Id.* at 395 (Brennan, J., joined by all other Members of the Court, concurring in part).

The majority also rejected AT&T's argument that *Pallas* had given the PDA retroactive effect. The majority reasoned that "[o]nly one Supreme Court decision cast doubt on whether Title VII prohibited employers from discriminating on the basis of pregnancy," and that the "PDA therefore did not alter Hulteen's or AT&T's rights or liabilities under Title VII, but corrected *Gilbert*'s erroneous interpretation of Title VII." Pet. App. 11a n.6.

Judge O'Scannlain, joined by Judges Rymer, Bybee, and Callahan, dissented. The dissent explained that, by characterizing respondents' claim as a current violation of Title VII, the majority contravened *Evans* and *Ledbetter*, which hold that "'current effects alone cannot breathe life into prior, uncharged discrimination.'" Pet. App. 43a (quoting *Ledbetter*, 127 S. Ct. at 2169). *Evans* and *Ledbetter* could not be avoided by labeling the NCS system "facially discriminatory," the dissent explained, because eligibility and benefits are determined based on NCS dates, which are facially neutral. *Id.* at 44a. The majority's conclusion that the NCS system treats "similarly situated" employees differently "necessarily depends on a retroactive application of the PDA." *Id.* at 45a. Women who took pre-PDA pregnancy leaves were not "similarly

situated" to workers who took leaves prior to 1979 for other reasons because, under AT&T's then lawful policies, those women were not entitled to the same full service credit for those leaves. *Id.* at 45a-46a.

Absent the false premise of "facial discrimination," the dissent explained, this case was indistinguishable from *Evans*. "Because of the past acts of discrimination, Evans and Hulteen had less seniority, and, not surprisingly, the determinations of their benefits . . . were adversely affected." Pet. App. 49a (footnote omitted). Unlike the situation in *Bazemore*, moreover, AT&T did not simply continue a pre-enactment practice (granting less than full service credit for pregnancy leaves) after Congress had outlawed that practice; instead, AT&T had failed to remedy pre-enactment discrimination, which *Bazemore* expressly held was not required. *Id*. at 51a-53a.

## SUMMARY OF ARGUMENT

I. Just weeks before the Ninth Circuit issued its divided *en banc* ruling, this Court re-affirmed the principle, first announced three decades ago in *Evans*, that a new violation of Title VII does not occur when an employer gives present effect to a past act of unlawful discrimination. *Ledbetter*, 127 S. Ct. at 2167-70. While this principle mandates reversal of the judgment below, respondents' claims are foreclosed for a more basic reason. The NCS system does not give present effect to actions that were *unlawful* at all, because AT&T's pre-PDA service credit denials were legal when made. Accordingly, the majority's determination that AT&T's reliance on these lawful decisions violates Title VII necessarily rests on impermissible retroactive application of the PDA.

Prior to the PDA, this Court held that excluding pregnancy from a general disability benefits plan is "not a gender-based discrimination at all" under Title VII. *Gilbert*, 429 U.S. at 136. In light of *Gilbert*, the Ninth Circuit itself recognized that, before the PDA took effect, Title VII did not require employers to treat pregnant women the same as temporarily disabled men and women, *Pallas*, 940 F.2d at 1325. Other courts reached the same conclusion in cases involving the very NCS system at issue here. See *Ameritech Benefit Plan Comm.* v. *Communication Workers of Am.*, 220 F.3d 814, 823 (7th Cir. 2000); *In re Southwestern Bell Tel. Co. Maternity Benefits Litig.*, 602 F.2d 845, 848-49 (8th Cir. 1979).

By ruling that AT&T's continued reliance on lawfully adjusted NCS dates violated Title VII, the decision below plainly gave the PDA retroactive effect. As the majority applied it, the PDA changed the legal consequences of previously lawful pre-PDA actions and imposed new obligations on AT&T, requiring it to grant service credit to women for pre-PDA pregnancy leaves that were not qualified for such credits under AT&T's then-lawful leave policies. Nothing in the PDA justifies such retroactivity.

The majority and respondents offer various arguments to show that imposition of liability in this case does not involve retrospective application of the PDA, but none withstands scrutiny. The PDA did not merely "clarify" that Title VII had always prohibited discrimination on the basis of pregnancy. *Gilbert* established that, prior to the PDA, Title VII's prohibition on sex discrimination did not cover the denial of benefits to pregnant women. If Congress passed the PDA to "clarify" that Title VII had always proscribed such conduct, therefore, then it had to give the PDA

retroactive effect. Congress, however, plainly did not do so.

Nor is it true that each new application of the NCS system gives rise to a new Title VII violation because that system is "facially discriminatory." Contrary to the lower court's theory, employees who took pre-PDA pregnancy leaves are not "similarly situated" to men and women who took pre-PDA disability leaves. Under AT&T's then-lawful policies, employees in the former group were not entitled to full service credit for their leaves, while employees in the latter group were. Thus, the NCS system does not treat "similarly situated" employees differently.

More fundamentally, the lower court's characterization of the NCS system as "facial discriminatory" is *ipse dixit*. Pension benefits are determined based on an employee's term of employment, which is derived from the difference between her retirement date and her facially neutral NCS date. Nothing on the face of the NCS system discriminates on the basis of sex or pregnancy.

Finally, AT&T's post-PDA correction of a single employee's NCS date does not show that AT&T is still applying its pre-PDA leave policies. Such a correction is simply permissible reliance on previously lawful conduct.

II. Even if AT&T's denial of service credit for pre-PDA pregnancy leaves had been unlawful, respondents' challenges to those denials would be untimely. The limitations period for challenging those employment practices expired decades ago. And this Court's decisions in *Evans*, *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989), and *Ledbetter* make clear that those time-barred claims were not revived sim-

ply because, in calculating respondents' pension benefits, AT&T's NCS system gave present effect to past acts of unlawful discrimination.

Indeed, this case is analytically indistinguishable from *Evans*. The seniority systems in *Evans* and this case relied on historical facts (resignations in *Evans*, adjusted NCS dates) caused by no-longer extant policies (no marriage rules in *Evans*, pre-PDA leave policies here). Both systems operated in the same nondiscriminatory manner: United's system treated all resignations the same, regardless of any underlying causes, just as AT&T treats all NCS dates the same, regardless of any reasons they may have been adjusted. Just as the seniority system in *Evans* could rely on the fact of a resignation without violating Title VII anew, so too here, AT&T's NCS system could lawfully rely on the adjusted NCS dates of its formerly pregnant employees.

*Bazemore* does not dictate a contrary result. There, the employer continued a practice—paying white and black employees different wages for the same work—after Congress had outlawed that very practice. Here, AT&T ceased treating pregnancy leaves differently than disability leaves the moment the PDA took effect. Ultimately, the majority found *Bazemore* to be controlling based on the conclusion that the AT&T's seniority system, like the pay structure at issue in *Bazemore*, is facially discriminatory. Because that characterization of the NCS system is patently erroneous, *Bazemore* does not apply here.

There is likewise no merit to the suggestion that respondents could not have challenged AT&T's service credit denials after they took their pregnancy leaves, because those actions were not completed "employment practices" but were instead mere "precursors" to later pension benefit awards. Because

service credit or seniority is a contract right of central importance to the employment relationship, an employer's denial of service credit is indisputably an "employment practice" that, if unlawful, must be challenged at the time it occurs. This straightforward conclusion is confirmed by the text of Title VII, this Court's analysis of analogous provisions of the National Labor Relations Act, and by the decision in *Ricks*, which involved an analogous denial of tenure.

Respondents' newly-minted claim that they were merely "advised" after their leaves that AT&T intended to deduct service credit when they retired is flatly belied by the record in this case. The record likewise forecloses their new theory that they brought a timely challenge under § 706(e)(2) to a facially neutral system that was adopted for an intentionally discriminatory purpose. There is no evidence that NCS system was adopted for such a purpose, which is why respondents relied exclusively on their invalid "facial discrimination" theory when invoking § 706(e)(2) below. In all events, their claims were time-barred long before § 706(e)(2) was adopted in 1991, and respondents do not—because they cannot—demonstrate that Congress intended to override the rule that a law lengthening the applicable statute of limitations is not to be applied to revive moribund claims. *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 950 (1997).

III. Finally, § 703(h) of Title VII precludes a finding of liability. Section 703(h) provides that the perpetuation of past acts of discrimination by a bona fide seniority system is not an unlawful employment practice at all. And *Evans* holds that the mere fact that a time-barred past event affects the calculation of seniority does not render a seniority system itself non-bona fide.

Tacitly recognizing this, the majority read a clause in the PDA to override § 703(h). In fact, Congress added this clause to foreclose the possibility, suggested by this Court in *Gilbert*, that the last sentence of § 703(h) (known as the Bennett Amendment) would permit wage discrimination on the basis of pregnancy. The majority's contrary reading is not faithful to the text of this clause or the circumstances surrounding its adoption.

## ARGUMENT

### I. BECAUSE CONGRESS DID NOT GIVE THE PDA RETROACTIVE EFFECT, AT&T'S POST-PDA RELIANCE ON LAWFUL PRE-PDA SERVICE CREDIT AWARDS CANNOT VIOLATE TITLE VII.

The Ninth Circuit's decision necessarily gave the PDA impermissible retroactive effect. Prior to the passage of that Act, this Court's authoritative interpretation of Title VII made clear that AT&T was not required to award full, or any, service credit for time spent on pregnancy leaves. See, *e.g.*, *Gilbert*, 429 U.S. at 127-28. When the PDA took effect, AT&T immediately terminated its prior pregnancy leave policy, and began awarding the same full service credit for pregnancy leaves that it awarded for paid disability leaves. In the decision below, however, the majority ruled that AT&T was obligated, in post-PDA pension determinations, to recognize full service credit for maternity leaves taken *before* the PDA took effect, and that AT&T's failure to do so violates Title VII. By recognizing such an obligation, the majority plainly gave retroactive effect to the PDA, which just as plainly applies only prospectively. The majority's efforts to deny that it was applying the PDA retroactively do not withstand scrutiny.

### A. Prior To The PDA, Denial Of Service Credit For Time Spent On Pregnancy Leaves Was Lawful.

Prior to the adoption of the PDA, this Court ruled that employers could lawfully exclude pregnancy and pregnancy-related conditions from generally available benefits policies. Accordingly, AT&T's pre-PDA policy of awarding less than full service credit for time spent on pregnancy leaves complied with federal law.

In *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), the Court addressed a constitutional challenge to California's policy of excluding pregnancy from a disability program that provided benefits to private sector employees who were temporarily unable to work and ineligible for workers' compensation. In concluding that the pregnancy exclusion did not violate the Fourteenth Amendment's equal protection guarantee, the Court ruled categorically that distinctions based on pregnancy did not constitute sex discrimination at all. *Id.* at 496 n.20 ("The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities.").

*Geduldig* served as the starting point for the Court's subsequent decision in *Gilbert*, which upheld a similar disability benefits program under Title VII. Like California's plan, General Electric's disability plan provided nonoccupational sickness and accident benefits, but excluded pregnancy. The Court held that this disparate treatment of pregnancy did not constitute sex discrimination under Title VII. *Gilbert*, 429 U.S. at 136 ("Since it is a finding of sex-based discrimination that must trigger the finding of an unlawful employment practice . . . *Geduldig* is precisely in point in its holding that an exclusion of

pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all."). As the *Gilbert* dissent recognized, this holding "reject[ed] the unanimous conclusion of all six Courts of Appeals that ha[d] addressed this question." *Id.* at 146-47 (Brennan, J., dissenting) (citing cases). One of those decisions involved the very pre-PDA Bell System pregnancy leave policy at issue here; in light of *Gilbert*'s holding, this Court vacated the Second Circuit's ruling that employees could challenge that leave policy under Title VII. See *Communications Workers of Am.* v. *American Tel. & Tel. Co.*, 513 F.2d 1024 (2d Cir. 1975), *vacated and remanded*, 429 U.S. 1033 (1977).

Given this authoritative construction of Title VII, AT&T's pre-PDA policy of denying full service credit for maternity leaves was plainly lawful prior to the PDA's enactment. Indeed, the Ninth Circuit itself acknowledged in *Pallas* that, prior to the PDA, "the law did not require employers to treat pregnant women like temporarily disabled men," 940 F.2d at 1325 (citing *Gilbert*). Other circuits, in cases involving challenges to the same NCS system at issue here, have reached the same conclusion, see *Ameritech*, 220 F.3d at 823; *Southwestern Bell*, 602 F.2d at 848-49; see also Pet. App. 45a (O'Scannlain, J., dissenting). And the EEOC observed in its brief below that, before the PDA, "'the denial of service credit to women on maternity leave was not unlawful.'" JA 146; see also *id.* at 136-37 n.1.

Once the PDA took effect, AT&T changed its leave policies and granted the same full service credit for maternity leaves that it provided for paid disability leaves. There is no dispute that AT&T has complied with the PDA for all pregnancy leaves taken after the law took effect. AT&T did not, however, grant retro-

active service credit to women who had taken pregnancy leaves before the PDA took effect. This "failure" to "restore" service credit for pre-PDA pregnancy leaves cannot violate Title VII, because the PDA does not apply retroactively.

### B. The En Banc Majority Necessarily Gave The PDA Impermissible Retroactive Effect.

*Landgraf* explains that a statute has retroactive effect if, among other things, it "creates a new obligation," "changes the legal consequences of acts completed before its effective date," or "gives a quality or effect to acts or conduct which they did not have . . . when they were performed," 511 U.S. at 269 n.23 (internal quotation marks omitted). As the majority construed it, the PDA has all of these consequences.

Prior to the PDA's effective date, AT&T could lawfully decide not to award full service credit for time spent on pregnancy leaves and could accordingly adjust the NCS dates of women who took such leaves. Thus, the day *before* the PDA took effect, it was lawful to rely on such adjusted NCS dates when making pension and other seniority-based benefit decisions. Under the majority's reasoning, however, a decision to rely on that same NCS date for that same purpose *after* the PDA took effect violates Title VII.

As the majority construed it, therefore, the PDA "create[d] a new obligation"—*i.e.*, it required AT&T, when making post-PDA benefit determinations, to recognize full service credit for pre-PDA pregnancy leaves even though, prior to the PDA, AT&T had no such obligation. Indeed, the majority was quite explicit on this score. It expressly stated that "AT&T violated Title VII by failing to credit *pre-PDA pregnancy leave* when it calculated benefits owed

Hulteen" *in 1994*. Pet. App. 7a (emphasis added); see also *id.* at 19a ("[i]t was well within AT&T's ability and control to calculate Hulteen's benefits in 1994 giving her service credit for the time she spent on pregnancy leave, and to thus avoid violating the PDA"); *id.* at 21a ("AT&T could have simply credited the applicable number of days to each plaintiff's NCS date when it calculated her benefits"). This is the very essence of retroactivity.

Similarly, under the majority's reading, the PDA "change[d] the legal consequences of acts completed before its effective date": service credit calculations that did not give rise to legal liability before the PDA give rise to such liability now. And, as the majority construed it, the PDA "g[ave] a quality or effect to acts or conduct which they did not have . . . when they were performed": previously lawful NCS date adjustments became unlawful.

It is "'a rule of general application'" that "'a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication.'" *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 37 (2006). The PDA contains no such requirement. To the contrary, its language clearly indicates that it applies only prospectively.

The PDA provides that "[e]xcept as provided in subsection (b) [regarding fringe benefit programs], the amendment made by this Act shall be effective on the date of enactment." PDA, § 2(a), 92 Stat. at 2076. Subsection (b), in turn, provides that benefits programs were not affected "until 180 days after the enactment" of the PDA. *Id.* § 2(b), 92 Stat. at 2076. This type of detailed "effective date" provision clearly embodies Congress's decision to apply the PDA prospectively. See *Landgraf*, 511 U.S. 257 n.10 (observing that a similar "effective-date" provision demon-

strated the "nonretroactivity" of the 1991 Civil Rights Act). "A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Id.* at 257. Here, the 180-day adjustment period for fringe benefits forecloses retroactivity. It would make no sense for Congress to render illegal pre-enactment pregnancy leave service credit awards, yet give employers a six-month period during which they could continue to rely on, and award benefits based on, such awards.

Not surprisingly, therefore, every court of appeals to have considered the issue—*including the Ninth Circuit itself*—has concluded that the PDA does not apply retroactively. See *Landgraf*, 511 U.S. at 257 n.10 ("The only Courts of Appeals to consider whether the 1978 amendments [to the Civil Rights Act] applied to pending cases concluded that they did not."); see also *Ameritech*, 220 F.3d at 823; *Whitehead* v. *Oklahoma Gas & Elec. Co.*, 187 F.3d 1184, 1193 (10th Cir. 1999); *Wambheim* v. *J.C. Penney Co.*, 642 F.2d 362, 363 n.1 (9th Cir. 1981); *Fields* v. *Bolger*, 723 F.2d 1216, 1218 n.4 (6th Cir. 1984); *Schwabenbauer* v. *Board of Educ.*, 667 F.2d 305, 310 n.7 (2d Cir. 1981); *Condit* v. *United Air Lines, Inc.*, 631 F.2d 1136, 1139-40 (4th Cir. 1980).[6] Accordingly, the PDA

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[6] Undoubtedly because of the Ninth Circuit's ruling in *Wambheim*, the majority made only a passing (and unacknowledged) effort to justify retroactive application of the PDA. Noting that the PDA provides that "women affected by pregnancy . . . shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work," 42 U.S.C. § 2000e(k), the majority claimed Hulteen "was again 'affected by pregnancy' when AT&T calculated her retirement benefits in 1994." Pet. App. 19a. No other court has adopted this strained reading of the phrase "affected by pregnancy," which neither "explicit[ly]" nor "by necessary

does not apply retroactively, and thus does not require employers to award employees service credit for time spent on pre-enactment pregnancy leaves. Because the majority below improperly construed the PDA to require such relief, its decision should be reversed.

### C. The Majority's Efforts To Show That It Did Not Apply the PDA Retroactively Are Without Merit.

Implicitly recognizing that the statute has only prospective application, the majority attempted to show that imposing liability for AT&T's reliance on lawful pre-PDA service credit awards did not involve retroactive enforcement of the PDA. First, the majority suggested that the PDA merely clarified that Title VII had always prohibited discrimination based on pregnancy, and that AT&T's pre-enactment service credit decisions were therefore never lawful. Second, the majority deemed the NCS system "facially discriminatory," and held that post-enactment reliance on NCS dates therefore gives rise to "current" violations of Title VII. Third, the majority reasoned that, because AT&T corrected the NCS date of one plaintiff because she did not receive the 30-day service credit for her pre-PDA leave, AT&T is still applying its pre-PDA leave policy. None of these theories withstands scrutiny.

#### 1. The PDA Did Not Merely Clarify That Title VII Had Always Barred Discrimination Based On Pregnancy.

The majority suggested that AT&T's pre-PDA conduct may have been unlawful because "[o]nly one Supreme Court decision [*Gilbert*] cast doubt on whether

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implication" *requires* retroactive application. *Fernandez-Vargas*, 548 U.S. at 37.

Title VII prohibited" pregnancy discrimination, Pet. App. 11a n.6, and Congress later "clarified" that Title VII did include such a prohibition, *id.* at 3a, 18a. This suggestion is baseless. *Gilbert* did not merely "cast doubt" on whether Title VII's prohibition on discrimination "because of sex" or "on the basis of sex" outlawed discrimination based on pregnancy: it held that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is *not a gender-based discrimination at all*" under Title VII, *Gilbert*, 429 U.S. at 136 (emphasis added). In so ruling, *Gilbert* flatly "reject[ed] the unanimous [contrary] conclusion of" the lower courts. *Id.* at 146-47 (Brennan, J., dissenting). It is, of course, "this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312 (1994). Indeed, the Ninth Circuit itself previously harbored no doubts about the controlling effect of *Gilbert*, citing it for the unqualified proposition that, before the PDA, "the law did not require employers to treat pregnant women like temporarily disabled men," *Pallas*, 940 F.2d at 1325.

Respondents half-heartedly suggest that the subsequent decision in *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), somehow rendered *Gilbert*'s ruling ambiguous. See Resp. Br. in Opp. 10 n.3. In *Satty*, however, the Court affirmed that "merely refus[ing] to extend to women a *benefit*" when they take pregnancy leaves does not violate Title VII, and thus an employer's policy "of not awarding sick-leave pay to pregnancy employees" was lawful. 434 U.S. at 142, 144 (emphasis added). By contrast, the Court held that a policy "of denying accumulated [*i.e.*, previously earned] seniority to female employees returning from

pregnancy leave violates . . . Title VII," because such a policy did not merely deny benefits to pregnant women but imposed burdens on them. *Id.* at 139. The Court stressed that "[t]he distinction between benefits and burdens is more than one of semantics," and that *Gilbert*'s ruling that it is permissible under Title VII to deny benefits to women who take pregnancy leaves did not "permit an employer to burden female employees" by divesting them of previously earned seniority. *Id.* at 142.

AT&T's pre-PDA pregnancy leave policy did not divest women of seniority accumulated before such leaves, but rather simply failed to award new service credit for time spent on such leaves. Because an award of service credit or seniority is indisputably a "*benefit[]* that [is] part of an employment contract," *Hishon* v. *King & Spalding*, 467 U.S. 69, 74 (1984) (emphasis added), pre-PDA policies that simply failed to grant the benefit of full service credit to women who took pregnancy leaves were plainly lawful under *Gilbert* and *Satty*.[7] Indeed, as previously noted, the

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[7] This is confirmed by the disposition of the petitions filed in *Satty* and *Communications Workers of America* v. *American Tel. & Tel. Co.*, 513 F.2d 1024 (2d Cir. 1975). The latter petition, which sought review of a decision reinstating a Title VII challenge to AT&T's pre-PDA pregnancy leave policy, was pending at the same time as the petition in *Satty*. If the Court believed that denying full service credit for pregnancy leaves was legally comparable to divesting accumulated seniority from women who took such leaves, it would have granted both petitions and consolidated the cases, or held AT&T's petition pending a decision in *Satty*. Instead, the Court vacated the Second Circuit's decision in the AT&T case in light of *Gilbert*, *see* 429 U.S. 1033 (1977), then granted the petition in *Satty* two weeks later. *See* 429 U.S. 1071 (1977) (No. 75-536).

Ninth Circuit, other circuits and the EEOC have all recognized this. See *supra* at 20.[8]

Nor does it matter that Congress "disapprov[ed] of both the holding and the reasoning of [*Gilbert*]," and therefore "corrected," Pet. App. 11a n.6 (internal quotation marks omitted), or "overruled" that decision by enacting the PDA. Resp. Br. in Opp. 10 n.3 (internal quotation marks omitted). Under settled law, *Gilbert* was the "authoritative statement of what the statute meant *before* as well as after" it was decided. *Rivers*, 511 U.S. at 312-13 (emphasis added). Congress obviously disapproved of *Gilbert*. But if it wanted the PDA to "mak[e] clear that" Title VII had *always* "covered[ed] pregnancy discrimination," Resp. Br. in Opp. 10 n.3, Congress had to give the PDA retroactive effect.

Because the PDA does not apply retroactively, *Gilbert* establishes that Title VII did not prohibit benefit denials based on pregnancy until the date the PDA took effect. Accordingly, the majority was plainly wrong in suggesting that AT&T's pre-PDA service credit awards for pregnancy leaves were unlawful. Thus, by imposing liability based on AT&T's reliance on lawful pre-PDA service credit decisions, the majority necessarily gave the PDA impermissible retroactive effect.

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[8] In light of the EEOC's own recognition that, before the PDA, denying service credit for pregnancy leaves was lawful under *Gilbert* and *Satty*, there is no merit to respondent's reliance on the EEOC's long-since superseded interpretations of Title VII. *See* Resp. Br. in Opp. 10 n.3 (citing 1973 interpretation that preceded the decisions in both *Gilbert* and *Satty*).

### 2. The NCS System Is Not "Facially Discriminatory."

The majority's "facial discrimination" theory cannot obscure the fact that AT&T's liability under Title VII depends on retroactive application of the PDA. The majority endorsed *Pallas*'s conclusion that the NCS system is "facially discriminatory" because that system supposedly "'distinguishes between similarly situated employees: female employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities.'" Pet. App. 9a (quoting *Pallas*, 940 F.2d at 1327). The majority therefore concluded that "AT&T applied its discriminatory seniority system to Hulteen in 1994, causing her to be deprived of early retirement benefits and thus injuring her." *Id.* at 20a; see also *id.* at 19a (in 1994, AT&T "deliberately cho[se] to use an NCS date that would deprive her of benefits received by those who were not 'affected by pregnancy.'").

But, as the en banc dissenters recognized, Pet. App. 45a-46a, *Pallas*'s theory that the NCS system is "facially discriminatory" depends on retroactive application of the PDA. Absent retroactivity, employees who took pre-PDA pregnancy-related leaves are *not* "similarly situated" to employees who took paid disability leave prior to 1979. Employees in the latter group were entitled to accrue seniority for the duration of their pre-PDA disability leaves, while (under AT&T's lawful pre-PDA leave policies) employees in the former group (like employees who took personal leave to finish college) were not. Only if the PDA retroactively invalidated the previously lawful distinction between these two groups of employees could they be deemed "similarly situated."

Similarly, the majority faulted AT&T for "deliberately choosing to use an NCS date that would deprive [Hulteen] of benefits received by those who were not 'affected by pregnancy.'" Pet. App. 19a. But that NCS date is facially neutral—it is nothing more than a date—and it was lawfully calculated. Because the PDA does not apply retroactively, AT&T cannot violate Title VII by "deliberately choosing to use" a lawful NCS date.

Ultimately, any claim that the NCS system is "facially discriminatory" is pure *ipse dixit*. Respondents' pension benefits were based on their term of employment ("TOE"); their TOEs were calculated based on the difference between their NCS dates and their dates of retirement; and their NCS dates do not mention, let alone draw distinctions based on, pregnancy. As the dissenters and the original panel majority properly recognized, nothing on the face of this system discriminates on the basis of gender or pregnancy. Pet. App. 44a, 81a. AT&T was entitled to rely on the NCS dates produced by its lawful pre-PDA leave policy. Respondents and the majority below cannot alter that right (and thereby give the PDA retroactive effect) through the simple and analytically baseless expedient of labeling the NCS system "facially discriminatory."

### 3. AT&T's Correction Of An Erroneously Calculated NCS Date Does Not Render The NCS System Unlawful.

Finally, the majority pointed to AT&T's correction of one respondent's NCS date as evidence that AT&T is still applying its pre-PDA leave policy. This reasoning is doubly flawed. Inferences cannot be drawn against AT&T to sustain a grant of summary judgment against it. And even if they could, the majority's "current violation" theory is simply an erroneous

legal characterization of AT&T's reliance on lawful pre-PDA service credit awards.

The parties stipulated that AT&T's Employee Benefit Committee determined that respondent Elizabeth Snyder had not been "given service credit for the first 30 calendar days of [her] leave (as was the policy at the time)." J.A. 46 (¶ 63) (internal quotation marks omitted). The Committee thus readjusted her NCS date, thereby increasing her TOE. *Id.* The majority seized on this fact, claiming it showed that

> when AT&T determines benefits eligibility, it reviews an employee's entire work history and affirmatively chooses to apply "the policy at the time" that the leave occurred . . . . AT&T's practice of applying the discriminatory pre-PDA policies constitutes a separate and actionable act of discrimination.

Pet. App. 21a-22a.

The stipulation of facts, however, nowhere states that AT&T routinely reviews every retiring employee's entire work history, or routinely determines whether its old leave policies were properly applied to the NCS dates of female employees who took pre-PDA pregnancy leaves. Drawing such an inference from a single incident in order to uphold a grant of summary judgment against AT&T in a class action is plainly improper: as the majority recognized, it was obligated to "view[] the evidence in the light most favorable to [AT&T]." Pet. App. 7a (second alteration in original).[9]

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[9] In fact, the proper inference to be drawn is that AT&T was responding to a specific *request* for correction of a specific NCS date. The letter does not state that AT&T discovered the error

More fundamentally, even if AT&T did routinely review its pre-PDA leave policies to determine the accuracy of the NCS dates of employees who took pre-PDA pregnancy leaves, this would not violate Title VII. As AT&T has shown, its pre-PDA leave policies and the resulting NCS date adjustments were lawful. The act of confirming that a policy was applied accurately at a time when it was lawful to apply that policy is nothing more than lawful reliance on then-lawful pre-PDA policies. Because the PDA is not retroactive, AT&T is entitled to assume, when confirming an NCS date, that an accurate application of its lawful pre-PDA leave policies to a pre-PDA pregnancy leave remains lawful.

By contrast, deeming such conduct a "current" violation of Title VII inescapably gives the PDA impermissible retroactive effect. According to the majority, if AT&T routinely confirmed the accuracy of the NCS dates, it was obligated to award additional service credit to women who took pre-PDA pregnancy leaves; failure to do so, according to the majority, is a current act of discrimination. Yet, as AT&T has shown, the PDA imposes no such obligation. Simply put, because the PDA does not require that AT&T award addi-

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in preparing Snyder's request for *retirement benefits*, but rather that it made the discovery "[i]n preparing *your claim for service credit*." J.A. 46 (¶ 63) (internal quotation marks omitted) (alteration in original). The natural inference is that Snyder herself recognized the error in her NCS date and submitted a claim for additional service credit. *See id.* at 38 (¶ 13) (noting that AT&T had authority "to resolve claims for . . . [her] 'TOE'"). That conclusion is bolstered by respondents' stipulation that "whether or not Snyder's NCS date was adjusted in the year 2000 does not affect the outcome of" the liability phase of the case, *id.* at 46 n.1, and by their failure to argue below that this adjustment is evidence that AT&T engages in current discrimination.

tional service credit to women who took pre-PDA pregnancy leaves, AT&T's failure to make such awards when determining the accuracy of an NCS date cannot be a current violation of Title VII. Once again, therefore, the majority's finding that AT&T violated Title VII rests on impermissible retroactive application of the PDA.

## II. RESPONDENTS' CLAIMS ARE UNTIMELY UNDER *EVANS* AND ITS PROGENY.

Even assuming *arguendo* that AT&T's treatment of service credit for pre-PDA pregnancy leaves was unlawful before the PDA took effect, that employment practice occurred decades ago. Thus, any claim that the practice violated Title VII was time-barred long before respondents brought this suit. Respondents nevertheless claim their suit is timely because they challenge AT&T's decision, within the limitations period, to award them reduced pension benefits as a result of their adjusted NCS dates (which shortened their TOEs). This theory is foreclosed by the line of cases that begins with *Evans*. Respondents' reduced benefits are the current consequences of service credit awards made before the PDA took effect, and *Evans* and its progeny establish that present-day effects of past discrimination do not give rise to a new Title VII claim.

To revive these expired claims, the majority and respondents rely on the groundless theory that the NCS system is "facially discriminatory." They also strain to identify a current act of intentional discrimination, arguing that the pre-PDA service credit awards were not actionable until they suffered a tangible loss of benefits or, alternatively, that AT&T merely "advised" them when they returned from their maternity leaves that it would reduce their service credit upon retirement. Finally, the majority and respondents

rely on § 112 of the Civil Rights Act of 1991, which provides that each injury resulting from a discriminatory seniority system is a new, actionable violation of Title VII. 42 U.S.C. § 2000e-5(e)(2). None of these theories or claims renders respondents' claims timely.

### A. Under *Evans* And Its Progeny, Current Effects Of AT&T's Allegedly Discriminatory Pre-PDA Service Credit Awards Are Not New Violations Of Title VII.

This Court has long held that the continuing impact of a no longer actionable past act of discrimination cannot sustain a Title VII claim. Thus, even if AT&T's pre-PDA leave polices and the resulting adjustments to respondents' NCS dates were unlawful, respondents' claims founder on this fundamental principle.

The seminal case is *Evans*. In 1968, United Air Lines forced Evans to resign based on a policy that forbade female flight attendants from marrying. *Evans*, 431 U.S. at 554. Although that policy was later found to violate Title VII, Evans never challenged it. After United eliminated that policy, it rehired Evans but refused to restore any seniority for her employment prior to her forced resignation. *Id.* at 555. Evans argued that this refusal was actionable discrimination under Title VII.

In rejecting this claim, this Court agreed with Evans' contention that United's seniority system gave

> present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a [timely] charge of discrimination . . . . A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory

> act which occurred before the statute was passed.

*Id.* at 558. Thus, United did not violate Title VII when its seniority system gave present effect to a past act that was no longer actionable.

The facts in *Evans* are indistinguishable from this case. Both the NCS system and United's seniority system relied on historical facts (resignations in *Evans*, adjusted NCS dates here) caused by past discriminatory policies—i.e., the no-marriage policy in *Evans* and the pre-PDA leave policies here. *Evans* holds that a seniority system can rely on such historical facts even if the policies that produced them were unlawful. Thus, even assuming the pre-PDA leave policies that produced respondents' adjusted NCS dates were unlawful, AT&T was entitled to treat those long unchallenged NCS dates as "the legal equivalent of a discriminatory act which occurred before [Title VII] was passed," and thus "as lawful." *Id.*

Moreover, the NCS system operated in the same non-discriminatory manner as United's seniority system. Because United did not recognize seniority for any service preceding a discharge or resignation, this Court concluded that United's seniority system was not discriminatory: it did not "treat[ ] former employees who were discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a non-discriminatory reason." *Id.* So too here, when respondents took their pregnancy leaves, the NCS system recognized only 30 days service credit for all personal leave, and did not treat women who took personal leaves under AT&T's pre-PDA pregnancy leave policies any differently than it treated male or female employees who took personal leaves for other reasons. And the NCS system has always treated all NCS dates the same,

regardless of the reasons for any adjustments to those dates. Thus, as the United States has recognized, AT&T's seniority system is "logically indistinguishable from the one in *Evans*," Br. of *Amicus Curiae* United States at 13.

In short, "[t]here is no meaningful basis for distinguishing *Evans* and this case." Pet. App. 49a (O'Scannlain, J., dissenting). As with Evans's claim, respondents' pre-PDA seniority calculations are "'merely . . . unfortunate event[s] in history which ha[ve] no present legal consequences.'" *Id.* at 39a.

This same dispositive principle was reaffirmed in *Ricks*, 449 U.S. at 280. There, a professor claimed that the decision to deny him tenure was discriminatory, but he waited another year, when his employment contract expired, to lodge his Title VII complaint. *Id.* Citing *Evans*, this Court deemed the suit untimely because the "only alleged discrimination occurred" at the time of the tenure decision, "even though one of the effects of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Id.* In other words, "the proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." *Id.* (alteration and internal quotation marks omitted).

Similarly, the plaintiffs in *Lorance* alleged that AT&T had adopted an intentionally discriminatory seniority system as part of a collective-bargaining agreement. Those plaintiffs did not bring a claim until several years later, when they were laid off as a result of seniority calculations. This Court held that Title VII required plaintiffs to have raised their challenge when the alleged intentionally discriminatory system was adopted. *Lorance*, 490 U.S. at 908 ("Like Evans, petitioners . . . have asserted a claim that is

wholly dependent on discriminatory conduct occurring well outside the period of limitations, and cannot complain of a continuing violation.").[10]

This well-settled principle was most recently reaffirmed in *Ledbetter*, 127 S. Ct. at 2169. There, the plaintiff alleged that she had received discriminatory performance evaluations over a number of years. Those poor evaluations allegedly led to a series of lower pay checks and the denial of a pay raise in 1998. *Id.* at 2167. While the evaluations and checks were outside of Title VII's charging period, the denial of the raise was not. Nevertheless, this Court held that under its prior holdings, including *Evans*, the suit was untimely. *Id.* at 2169 ("A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination.").

Using language directly applicable here, this Court explained that "[t]he fact that precharging period discrimination adversely affects the calculation of a neutral factor (*like seniority*) that is used in determining future pay does not mean that each new paycheck constitutes a new violation." *Id.* at 2174 (emphasis added). Here, respondents claim that "precharging period discrimination [*i.e.*, the pre-PDA leave policies] adversely affects the calculation of a neutral factor [*i.e.*, the NCS date that governs seniority] . . . used in determining [pension benefits]." But this "does not mean that each new [pension award] constitutes a

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[10] In response to *Lorance*, Congress amended Title VII to allow for liability arising from an intentionally discriminatory seniority system both at the time of its adoption and at the time of its application. 42 U.S.C. § 2000e-5(e)(2). Respondents cannot avail themselves of this expanded statute-of-limitations provision. *See infra* at 44-47.

new violation." Like the paychecks in *Ledbetter*, respondents' reduced pension benefits are simply present-day consequences of past discrimination; they are not new, actionable violations of Title VII. *Id.* at 2169 ("[C]urrent effects alone cannot breathe new life into prior, uncharged discrimination."). Indeed, the untimeliness of respondents' claims here is even clearer than it was in *Ledbetter*; in contrast to the plaintiff in that case, who was unaware of the discriminatory evaluations that adversely affected her compensation, respondents were repeatedly and fully apprised that AT&T had adjusted their NCS dates after they took their pregnancy leaves. See JA 41, 43-46 (¶¶ 28-31, 39-42, 50-53, 59-61).

### B. This Court's Decision In *Bazemore* Cannot Save Respondents' Untimely Claims.

To sidestep the foregoing dispositive authority, the majority below and respondents argue that this case, unlike *Evans* and its progeny, concerns a facially discriminatory system. Pet. App. 10a.[11] Consequently, they argue, it is not *Evans*, but this Court's decision in *Bazemore* that governs. This claim is baseless.

In *Bazemore*, the 1972 amendment of Title VII compelled the defendant state employer to integrate its previously segregated workforce. However, the employer continued to pay black workers less than its

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[11] Respondents also suggest *Evans* is inapplicable because United's no-marriage policy was "entirely outside the seniority system," whereas AT&T's pre-PDA leave policies were an element of the seniority system. Resp. Supp. Br. at 8. This distinction, even if true, is meaningless. Nothing in the *Evans* line of authority suggests that anything turns on whether the precharging conduct was "outside" or inside a seniority system. Rather, the critical question is whether the discriminatory act—whatever it may be—is "made the basis for a timely charge." *Evans*, 431 U.S. at 558.

white workers. This Court held that while "recovery may not be permitted for [pre-Title VII ] acts of discrimination," the employer's post-enactment practice of paying disparate wages to similarly situated black and white workers constituted a new violation of Title VII. *Bazemore*, 478 U.S. at 395. "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* at 395-96.

That holding has no application here. *First*, *Bazemore* applies only to *current* acts of discrimination, "not the carrying forward of a past act of discrimination." *Ledbetter*, 127 S. Ct. at 2173 n.5. *Bazemore* did not involve a situation in which an employer ceased a recently proscribed practice and simply gave current legal effect to pre-enactment decisions. Instead, it involved an employer that "*continued to engage in [an] act or practice*"—paying black workers less for the same work than white workers were paid—after Congress had outlawed that very practice. *Bazemore*, 478 U.S. at 395 (emphasis added); *see also National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 111-12 (2002) (discussing *Bazemore*). Accordingly, "*Bazemore* stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory [*i.e.*, presently illegal] pay structure." *Ledbetter*, 127 S. Ct. at 2174. "But a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is 'facially nondiscriminatory and neutrally applied.'" *Id.*

Thus, *Bazemore* does not control this case because, as AT&T has explained, the NCS system is facially neutral. Pension eligibility and other benefits provided by AT&T depend on an employee's facially neutral TOE, which is derived from the difference between that employee's retirement date and a facially neutral NCS date. See Pet. App. 44a-45a (O'Scannlain, J., dissenting) (AT&T's retirement plan is "facially nondiscriminatory and neutrally applied" because "calculation of eligibility and benefits under that plan are determined based on an NCS date maintained for each employee."); *id.* at 81a (original panel majority) (respondents' "unsubstantiated labeling of current actions by the defendants as 'facially discriminatory[]' is unpersuasive"); *Ameritech*, 220 F.3d at 823 (*Evans*, not *Bazemore*, applied to identical NCS system because "our case involves computation of time in service—seniority by another name—followed by a neutral application of a benefit package to all employees with the same amount of time."); *Leffman* v. *Sprint Corp.*, 481 F.3d 428, 433 (6th Cir. 2007) ("all non-credited leave is excluded from [the current] seniority calculations, and thus the effects of . . . past characterizations (whether justifiable or not) of leaves of absence as non-credited are now felt equally by men and women and by those with and without children.").

There is simply nothing *facially* discriminatory about the NCS system. Respondents and the majority below have simply used the phrase "facial discrimination" to refer to the fact that the NCS system gives present effect (through adjusted NCS dates) to AT&T's allegedly unlawful pre-PDA leave policies. Calling the NCS system "facially discriminatory," however, is not only inconsistent with any known meaning of the term "facial," it nullifies the central

holding of *Evans*. Indeed, in *Evans*, United's policy indisputably gave "present effect to a past act of discrimination," yet this Court deemed that seniority system non-discriminatory. 431 U.S. at 558.[12]

*Second*, *Bazemore* is inapplicable because the unlawful conduct in that case was continued racial discrimination after Title VII outlawed such conduct by state employers. "A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute." *Bazemore*, 478 U.S. at 395 (Brennan, J., concurring). In other words, the employer violated Title VII because wages were a "mere continuation of the pre-1965 [pre-Title VII] discriminatory pay structure." *Id.* at 395 n.6. By contrast, it is undisputed that, upon the effective date of the PDA, AT&T changed its leave policies to award service credits to pregnancy leaves on an equal basis with temporary disabilities. JA 50 (¶ 79).

### C. AT&T Engaged In No New, Actionable Violations Of Title VII When Respondents Retired.

The majority below also sought to escape the controlling import of *Evans* by reasoning that employees such as respondents could not have brought their suit

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[12] Similarly, the majority below held that *Evans* would control only if AT&T "credited neither pre-PDA pregnancy leave nor pre-PDA disability leave" when it made its benefits calculations. Pet. App. 9a n.4. Such action would have eliminated any effects of prior discrimination. But the very point of *Evans* is that the failure to remedy present effects of past discrimination is not a new act of intentional discrimination.

before the calculation of their retirement benefits. Respondents attempt to elaborate on this theory and to add yet another—that AT&T merely advised them that it would reduce their seniority in the future, but did not do so until they retired. The first of these claims is legally baseless. The second is flatly contradicted by the stipulated facts of the case.

### 1. AT&T's Pre-PDA Service Credit Awards Were Completed Employment Practices When Respondents Returned From Maternity Leaves.

The majority sought to distinguish *Evans* on the ground that women who took pre-PDA pregnancy leaves could not challenge their adjusted NCS dates until they felt the pension-related consequences of those adjustments. Pet. App. 9a (citing *Pallas*, 940 F.2d at 1327). Expanding on this theory, respondents characterize the award of service credit as a "precursor decision[]," akin to a performance evaluation or reprimand that precedes a "concrete adverse employment action that actually alters an employees' 'compensation, terms, conditions, or privileges of employment.'" See Resp. Supp. Br. at 11-12. They claim that seniority is not itself a term, condition or privilege of employment, and thus its denial is not actionable absent some other adverse employment action. They are mistaken. Service credit and other types of seniority are indisputably "terms, conditions, or privileges of employment" within the meaning of Title VII, and an award or denial of service credit or seniority is a completed employment practice that must be challenged at the time it occurs.

"Because the . . . employment relationship is contractual, it follows that the 'terms, conditions, or privileges of employment' clearly include benefits that are part of an employment contract." *Hishon*,

467 U.S. at 74. Service credit, like other forms of seniority, is a "benefit[ ] that [is] part of an employment contract." *Id.* And, the denial of seniority or service credit to an employee contractually entitled to such credit is a breach of contract. See, *e.g.*, *W.R. Grace & Co.* v. *Local Union 759, Int'l Union of the United Rubber Workers of Am.*, 461 U.S. 757, 763 (1983); *TWA, Inc.* v. *Hardison*, 432 U.S. 63, 81 (1977); *Lorance*, 490 U.S. at 905 ("Seniority is a contractual right."). Indeed, "[s]eniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 766 (1976) (citing S. Slichter, J. Healy & E. Livernash, *The Impact of Collective Bargaining on Management* 104-15 (1960)).

The text of Title VII itself confirms that seniority is a term, condition or privilege of employment by "afford[ing seniority systems] special treatment under Title VII." *Hardison*, 432 U.S. at 81. Section 703(h) provides that it shall "not be an unlawful employment practice for an employer to apply . . . different terms, conditions or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate." 42 U.S.C. § 2000e-2(h). Section 703(h) is "a definitional provision; as with the other provisions of § 703, subsection (h) delineates *which employment practices are illegal and thereby prohibited and which are not*." *Franks*, 424 U.S. at 758 (emphasis added).

The premise of the Court's analysis in cases addressing the seniority exception is that the award or denial of seniority is an employment practice. In *Hardison*, for example, this Court held that TWA had a bona fide seniority system and that it was not re-

quired to ignore that system and violate other employees' contractual seniority rights to accommodate Hardison's religious beliefs. *Hardison*, 432 U.S. at 80 (had TWA relieved Hardison of Saturday work and required a senior employee to replace him, the latter would "have been deprived of his contractual rights under the collective-bargaining agreement"). *Hardison* illustrates both the centrality of seniority as a contractual right and Congress's recognition of the importance of this term, condition or privilege of employment in enacting Title VII.

The National Labor Relations Act ("NLRA") confirms that seniority awards or denials are terms, conditions or privileges of employment within the meaning of Title VII. This Court has concluded that § 8(d) of the NLRA and § 2000e-2(a) of Title VII contain "analogous language," and therefore that § 8(d)'s meaning "sheds light on the Title VII provision at issue [§ 2000e-2(a)]." *Hishon*, 467 U.S. at 76 n.8.; see also *Pollard* v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 847-49 (2001).

Seniority is unquestionably a "term" or "condition" of employment under § 8(d) of the NLRA, 29 U.S.C. § 158(d). A prominent treatise notes that "[s]eniority is so obviously a condition of employment, and so commonly exists under union contracts, that litigation questioning its mandatory status has been minimal." 1 *The Developing Labor Law* 1300 (John E. Higgins, Jr., ed., 5th ed. 2006) (footnotes omitted) (citing *United States* v. *Gypsum Co.*, 94 N.L.R.B. 112 (1951), *Nev-Tun, Inc.*, 310 N.L.R.B. 138 (1993)). Thus, seniority is a mandatory subject of bargaining under the NLRA, see *id.*; see also *Remington Arms Co.*, 298 N.L.R.B. 266, 266 n.1 (1990), and an employer who unilaterally alters an employee's seniority (or a group of employees' seniority) without first bar-

gaining with the employees' representatives commits an unfair labor practice. See *Nev-Tun*, 310 N.L.R.B. at 140; cf. *Litton Fin. Printing* v. *NLRB*, 501 U.S. 190, 210 n.4 (1991) (an employer's "failure to lay off in inverse order of seniority" would constitute an unfair labor practice even after a contract so mandating expired because the employer would have unilaterally changed a term or condition of employment). Moreover, an employer who deprives an employee of contractual seniority breaches its collective bargaining agreement with the union and violates the affected employees' contract rights. See, *e.g.*, *Hardison*, 432 U.S. at 79; *TWA, Inc.* v. *Independent Fed'n of Flight Attendants*, 489 U.S. 426, 434-35 (1989).

In sum, AT&T's decision to award less than full seniority to women who took pre-PDA pregnancy leaves was indisputably an "employment practice" affecting a term, condition or privilege of employment. That employment practice was complete—and thus actionable if unlawful—at the time the service credit determination occurred. Respondents, therefore, were required to challenge their pregnancy-related service awards within the limitations period following their return from maternity leave, and their failure to do so renders their current challenges untimely.

*Ricks* confirms this straightforward conclusion. There, the Court held that the terminated employee's Title VII claim accrued when he lost tenure and that his subsequent claim, following the job loss, was time barred. The Court reached this conclusion because tenure, like seniority, is an important term, condition or privilege of employment; and its loss thus constituted an actionable injury that set the statute of limitations running, even though the job loss did not occur simultaneously.

Like *Ricks*, respondents knew that the consequence of the denial of the particular term, condition or privilege of employment (in *Ricks*, tenure; here service credit) would be the loss of another employment benefit (in *Ricks*, the job itself; here, some amount of pension benefits). There was nothing contingent about the consequences of AT&T's denial of service credit; its consequence was the loss of some benefits, and that denial was therefore a completed act that had to be immediately challenged.[13]

In sum, respondents characterization of an award of less than full seniority as a "precursor decision" without consequences is completely divorced from the reality of the employment relationship, and cannot save their untimely claims.

**2. AT&T Did Not Wait Until Respondents Retired To "Deduct" Service Credit For Their Pre-PDA Pregnancy Leaves.**

Tacitly conceding that denials of full service credit are actionable when they occur, respondents try to show that AT&T did not actually deny them full service credit for their pre-PDA pregnancy leaves until they retired. Thus, they claim that AT&T merely "advised them that it *would* deduct" service credit for those leaves sometime in the future, and that the loss of seniority did not occur until "AT&T calculated respondents' pension benefits *upon their retirements*." Resp. Br. in Opp. 11, 1 (emphases added) (footnote

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[13] The suggestion that respondents could not have challenged AT&T's seniority awards until they received their reduced pension benefits is also refuted by cases that entertained such challenges decades ago. *See Southwestern Bell*, 602 F.2d at 848-49; *Communications Workers*, 513 F.2d at 1025-26.

omitted); see also *id.* at ii, 2, 3, 4, 12. These statements are demonstrably false.

The parties' stipulation recites that, following her pregnancy leave, "PT&T *in 1969 changed* Hulteen's NCS date from January 5, 1965 to August 3, 1965." JA 41 (¶ 28) (emphasis added). When the Bell System broke up on January 1, 1984 and Hulteen was transferred from PT&T to AT&T, she "*maintained* the August 3, 1965 NCS date she *had had as an employee of PT&T*." *Id.* (¶ 29) (emphases added). Indeed, "[t]hroughout her employment with PT&T and AT&T, Hulteen periodically received documents that contained the August 3, 1965 NCS date." *Id.* (¶ 30). The stipulation makes clear that the NCS dates of the other respondents were adjusted when they returned from their pre-PDA pregnancy leaves, and that they likewise maintained and were apprised of their adjusted NCS dates. See JA 43-46 (¶¶ 39-42, 50-53, 59-61).

Accordingly, respondents conceded below that AT&T simply "continued to use the NCS date *previously computed* for leave taken before April 29, 1979"—the PDA's effective date—and they challenged AT&T's failure to "*restore[] time deducted* due to pregnancy." See JA 75 (emphases added); see also *id.* at 76 ("[a]t no time after [respondents] became AT&T employees, did AT&T recalculate their NCS dates to include *previously uncredited* pregnancy-related disability leave") (emphasis added). The assertion that AT&T waited until respondents retired to "deduct" the time they spent on pregnancy leaves from their TOEs is thus utterly baseless.

Respondents therefore cannot equate AT&T's conduct to that of the hypothetical employer described in *Ledbetter*. See Resp. Br. in Opp. 11. AT&T did not decide in 1969 to discriminate against respondents in

the future, then wait *three decades* to "put that discriminatory intent into practice." *Id.* Here, "the specific employment practice[s] that [are] at issue," *Ledbetter*, 127 S. Ct. at 2167, were decisions to deny full service credit for pregnancy leaves by adjusting the NCS dates of those who took such leaves. These allegedly "discriminatory . . . decision[s] [were] made and communicated to" respondents, *id.* at 2169, *in the 1960s and 1970s*. And these decisions affected respondents long before they retired, as NCS seniority was used "for many employment-related purposes, including job bidding, shift preference, layoffs [and] eligibility for certain benefit programs." JA 39 (¶ 19).

The fact that respondents' pension benefits were not finally calculated until they retired is irrelevant. "The fact that precharging period discrimination adversely affects the calculation of a neutral factor (like seniority) that is used in determining [retirement benefits] does not mean that [each pension-setting decision] constitutes a new violation." *Ledbetter*, 127 S. Ct. at 2174. To the contrary, all that respondents have alleged is that AT&T "discriminated against [them] in the past," when it adjusted their NCS dates to deny them full service credit for pre-PDA pregnancy leaves, "and that this discrimination reduced the amount of later [pension benefits]." *Id.* *Ledbetter* and *Evans* make clear that these allegations do not state a claim for a current violation, and respondents cannot escape this fact by mischaracterizing AT&T's pension-setting decisions as post-PDA decisions to "deduct" seniority.

### 3. Section 706(e)(2) Does Not Render Respondents' Claims Timely.

Finally, the Ninth Circuit deemed respondents' claim timely under § 706(e)(2). This reasoning is mistaken.

In *Lorance*, this Court had held that, although an employee can challenge a "facially discriminatory seniority system . . . at any time," 490 U.S. at 912, a challenge to a facially neutral system that was allegedly adopted for an intentionally discriminatory purpose can be brought only within the limitations period following the adoption of that system. *Id.* at 905-06. In response, Congress enacted § 706(e)(2) of Title VII, which provides that facially neutral but intentionally discriminatory systems can be challenged

> when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

42 U.S.C. § 2000e-5(e)(2) (emphasis added). Based on § 706(e)(2), the Ninth Circuit concluded that "AT&T applied its discriminatory seniority system in 1994, causing [respondents] to be deprived of early retirement benefits and thus injuring [them]." Pet. App. 20a; see also Resp. Br. in Opp. 14 (arguing that, "even if AT&T's NCS system could somehow be characterized as facially neutral," it is an "intentionally discriminatory seniority system subject to" § 706(e)(2)).

Respondents did not make this argument below, and for good reason: The stipulation nowhere states that AT&T adopted the NCS system or its pre-PDA leave policies with the intent or for the purpose of discriminating against women. Accordingly, respondents posed the issue below as whether AT&T committed "an unlawful employment practice under 42 U.S.C. §2000e-2(a) *and §706(e)(2)* each time it applied its *facially discriminatory* NCS system." JA 71 (emphases added). And they argued that § 706(e)(2) "codified the Supreme Court's conclusion that a facially discriminatory system—*such as AT&T's*—can

be challenged whenever it is applied." *Id.* at 99-100 (emphasis added). See also *id.* at 95 (AT&T's system "remains facially discriminatory . . . . Thus, under . . . §706(e)(2), each application of AT&T's 'seniority system' is a separate discriminatory act"); *id.* at 101 ("by enacting §706(e)(2), Congress clearly evinced an intent to authorize the types of claims [respondents] brought in this case to challenge a *facially discriminatory* seniority system when it was applied") *id.* at 99 (explaining that § 706(e)(2) adopted the reasoning of the *Lorance* dissent, "which would have held both a facially discriminatory system, *like that in Bazemore and here*, and a facially neutral system adopted with an intent to discriminate, like the one in *Lorance*, could be challenged when applied.") (emphasis added).[14]

In all events, § 706(e)(2) cannot render respondents' claims timely. Before its enactment, *Lorance* had established that a facially neutral system that was allegedly adopted for an intentionally discriminatory purpose could only be challenged within the limitations period following its adoption. 490 U.S. at 905. Although § 706(e)(2) changed that rule prospectively, "'a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme because to do so would alter the substantive rights of a party and increase a party's liability." *Hughes Aircraft*, 520

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[14] Indeed, respondents made clear that any claim that the NCS system was intentionally discriminatory was predicated on their claim of facial discrimination. *See* JA 89 (describing AT&T's pre-PDA leave policies as "facially discriminatory," then asserting that "such a facially discriminatory policy constitutes intentional discrimination regardless of the subjective motivation"); *id.* ("a facially discriminatory policy 'evinces discrimination on the basis of sex' even if motivated by a benign purpose.").

U.S. at 950 (quoting *Chenault* v. *United States Postal Serv.*, 37 F.3d 535, 539 (9th Cir. 1994)); see also *id.* ("extending a statute of limitations after the pre-existing period of limitations has expired impermissibly revives a moribund cause of action."). Neither respondents nor the majority have identified any evidence that Congress intended § 706(e)(2) to override this rule, and indeed there is none.

AT&T adopted its pre-PDA leave policies sometime before Hulteen's 1969 pregnancy leave. Thus, even assuming those leave policies are properly deemed part of the current NCS system and were adopted for an intentionally discriminatory purpose, any Title VII claim challenging those policies would have expired decades before Congress enacted § 706(e)(2) in 1991, and were not revived by that provision.

## III. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH § 703(h) OF TITLE VII's PROTECTION OF BONA FIDE SENIORITY SYSTEMS.

Section 703(h) of Title VII likewise establishes that, even if AT&T's pre-PDA leave policies were unlawful, the fact that the NCS system gives present effect to those policies (in the form of reduced pension benefits) does not constitute a current violation of Title VII. The majority's conclusion that § 703(h) is inapplicable to this case is mistaken.

### A. Under § 703(h), Current Effects Of AT&T's Allegedly Discriminatory Pre-PDA Service Credit Awards Are Not Actionable.

"[S]eniority systems are afforded special treatment under Title VII." *Hardison*, 432 U.S. at 81. Specifically, § 703(h) provides that:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(h).

Accordingly, even if a seniority system perpetuates the effects of past sex-based discrimination, those effect are categorically not an "unlawful employment practice" if the seniority system is bona fide, *i.e.*, facially neutral and lacking in discriminatory intent. See generally *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 352-54 (1977); see also *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 65 (1982) ("Under § 703(h), the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved."); *Hardison*, 432 U.S. at 82 ("absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice *even if [as here] the system has some discriminatory consequences*.") (emphasis added). The decision below contravenes § 703(h).

AT&T's NCS system plainly satisfies § 703(h). The NCS system is not "facially discriminatory." See *infra* at 36-37. It simply gives present effect to AT&T's pre-PDA leave policies by relying on adjusted NCS dates, which in turn result in shorter TOEs and thus reduced pension benefits for respondents. This type of perpetuation of past acts of discrimination neither undermines the bona fide character of the NCS sys-

tem, nor gives rise to a new violation of Title VII. As the *Evans* Court explained, under § 703(h)

> a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer. A contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations. Such a result would contravene the mandate of § 703(h).

*Evans*, 431 U.S. at 560.

Accordingly, under § 703(h), respondents' alleged injuries resulting from AT&T's NCS seniority system do not constitute an "unlawful employment practice." See Pet. App. 53a-56a (O'Scannlain, J., dissenting).

### B. The PDA Does Not Override The Protections Of § 703(h).

The majority sought to circumvent § 703(h), contending that a clause of the PDA rendered § 703(h) inapplicable in pregnancy discrimination cases. This is simply wrong.

It is evident from its plain language that § 703(h) applies in all cases involving discrimination rendered unlawful by Title VII, including pregnancy discrimination. The exception for bona fide seniority systems applies "*[n]otwithstanding* any other provision of this subchapter," which encompasses Title VII. 42 U.S.C. § 2000e-2(h) (emphasis added). As this Court has observed, the "use of . . . a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override con-

flicting provisions of any other section." *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10, 18 (1993).

Indeed, the history of § 703(h)'s drafting not only underscores its signal importance to the passage of Title VII, but it belies the Ninth Circuit's view that Congress would have quietly eliminated the bona fide exception in the pregnancy context. Early versions of Title VII did not contain any provision regarding seniority systems. But during floor debate in the Senate, legislators expressed a fear that Title VII would require massive retroactive readjustments of seniority credits. The many years of discrimination prior to the passage of Title VII would naturally be reflected in employee seniority rights. If these effects of past discrimination were deemed unlawful, employers would have been obliged to unsettle vested seniority rights in order to remove the effects of past discrimination. *Franks*, 424 U.S. at 761.

It was in large part to assuage those fears and to confirm that Title VII had only prospective effect that the compromise substitute bill containing § 703(h) was proposed and enacted. *Id.* at 761 ("[I]t is apparent that the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act.").[15]

Departing from the clear Congressional mandate embodied in the statute, the Ninth Circuit held that § 703(h) applies to discrimination on the basis of race,

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[15] The Senate floor managers introduced several items into the Congressional Record to underscore that a seniority system remained lawful under Title VII—even if it carried forward the effects of pre-Act discrimination. *Franks*, 424 U.S. at 761-62.

religion, national origin and sex, but not if the sex discrimination is based on pregnancy. Pet. App. 27a n.11. This incongruous conclusion rests on a clear misreading of the PDA.

The PDA's first clause provides that discrimination on the basis of pregnancy is sex discrimination. See 42 U.S.C. § 2000e(k) ("[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . . ."). The second clause then "explains the application of the general principle [embodied in the first clause] to women employees." *Newport News*, 462 U.S. at 678 n.14. It provides that "women affected by pregnancy" must be treated for all employment purposes "as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). This explanatory second clause then ends by providing that "nothing in section 2000e-2(h) [§ 703(h)] of this title shall be interpreted to permit otherwise." *Id.*

Congress added the "nothing in section 2000e-2(h)" phrase to the end of the second clause in order to overrule this Court's suggestion in *Gilbert* that the last sentence in § 703(h)—referred to as the Bennett Amendment—permitted wage discrimination based on pregnancy. The Bennett Amendment was intended to reconcile the Equal Pay Act, 29 U.S.C. § 206(d), with Title VII, by incorporating the Equal Pay Act's affirmative defenses. *County of Washington* v. *Gunther*, 452 U.S. 161, 194 (1981) (Rehnquist, J., dissenting) (noting that the Bennett Amendment means that "'discrimination in compensation on account of sex does not violate title VII unless it also violates the Equal Pay Act.'") (emphasis omitted). In *Gilbert*, this Court declined to defer to an EEOC regulation finding that pregnancy discrimination was

discrimination on the basis of sex because a regulation by the Department of Labor had interpreted the Bennett Amendment to permit wage discrimination on the basis of pregnancy. *Gilbert*, 429 U.S. at 144-45.

With the passage of the PDA, Congress plainly meant to ensure that "nothing" in § 703(h)—including this Court's interpretation of the Bennett Amendment should—should be construed to permit the wage discrimination based on pregnancy that the PDA prohibited. See *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 285 (1987) (noting that "the [PDA's] second clause was intended to overrule the holding in *Gilbert*"). Thus, this proviso "was not intended to remove Title VII's protection for bona fide seniority systems in cases involving pregnancy, but rather to foreclose the possibility, raised in *Gilbert*, that the last sentence of Section 703(h) would permit wage discrimination on the basis of pregnancy." Br. of *Amicus Curiae* United States at 15 n.4.

The PDA's legislative history confirms this reading. The House Committee Report explained that "[t]his disclaimer was necessitated by the Supreme Court's reliance in the *Gilbert* case on Section 703(h) of Title VII ("the Bennett Amendment")." H.R. Rep. No. 95-948, at 7 (1978).

> While the Gilbert [sic] opinion is somewhat vague as to the pertinence of the regulation, it does appear that the court regarded the Bennett amendment and the Equal Pay Act regulation, taken together, as somehow insulating pregnancy-based classifications from the proscriptions of Title VII. . . .
>
> Therefore, the committee determined that it was necessary to expressly remove the Bennett

> amendment from the pregnancy issue in order to assure the equal treatment of pregnant workers.

*Id.*[16] As this legislative history makes plain, the PDA does not diminish the force of § 703(h)'s safe harbor for bona fide seniority systems.

Indeed, all it forbids is an interpretation of § 703(h) that would conflict with the PDA's mandate that pregnant women "shall be treated the same" as similarly situated employees, male or female. Because § 703(h) applies to claims brought by male or female employees, interpreting it to apply here to "women affected by pregnancy" would plainly not run afoul of the PDA's admonition that pregnant women be placed on equal footing with other employees.

The Ninth Circuit's view is simply not faithful to the text of the PDA. In effect, the court of appeals rewrites "nothing in [§ 703(h)] . . . shall be interpreted to permit otherwise" into "nothing in § 703 shall apply in pregnancy discrimination cases." But, "[i]f Congress had intended wholly to prohibit the application of [§ 703(h)] in all pregnancy discrimination cases, Congress would have expressed this intent more clearly, as it did with other provisions in the Civil Rights Act." Pet. App. 57a (O'Scannlain, J., dissenting) (citing 42 U.S.C. § 2000a(e) ("[t]he provisions of this subchapter shall not apply to a private club or

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[16] The Senate Committee Report echoes this reading:

> This disclaimer is made necessary by a suggestion in the Supreme Court's opinion in *Gilbert* v. *General Electric*. That opinion relied in part upon the Bennett amendment . . . .
>
> . . . [B]y expressly precluding reliance on section 703(h) in this context, therefore, the committee merely intends to insure that employers may not rely on the Equal Pay Act to prevent the correction of pregnancy discrimination under Title VII.

S. Rep. No. 95-331, at 7 (1977).

other establishment not in fact open to the public"), *id.* § 2000e-1(c)(2) ("Sections 2000e-2 and 2000e-3 of this title shall not apply with respect to the foreign operations of an employer.")).

Nor does it matter that the PDA was enacted after § 703(h). Pet. App. 26a. Construing the PDA to displace § 703(h) is in effect a repeal, which requires a "clear and manifest" indication by Congress. *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007). Neither the text of the PDA nor its legislative history justify suspending the operation of § 703(h)'s exemption for bona fide seniority systems.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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# ADDENDUM

## FEDERAL STATUTES

42 U.S.C. § 2000e: Definitions

* * * *

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

* * * *

[Note] Effective Date of 1978 Amendment; Exceptions to Application

Section 2 of Pub.L. 95-555 provided that:

"(a) Except as provided in subsection (b), the amendment made by this Act [amending this section] shall be effective on the date of enactment [Oct. 31, 1978].

"(b) The provisions of the amendment made by the first section of this Act [amending this section] shall

not apply to any fringe benefit program or fund, or insurance program which is in effect on the date of enactment of this Act [Oct. 31, 1978] until 180 days after enactment of this Act."

42 U.S.C. § 2000e-2: Unlawful employment practices

* * * *

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * * *

42 U.S.C. § 2000e-5: Enforcement provisions

* * * *

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is

adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

* * * *